SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000018

COMMONWEALTH OF KENTUCKY **APPELLANT**

VS.

On Motion for Certification of Law
Jefferson Circuit Court, Division Six
Indictment No. 13-CR-2070-003
Hon. Olu A. Stevens, presiding

JAMES DOSS **APPELLEE**

BRIEF *AMICUS CURIAE* OF THE KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE

Respectfully submitted,

KENTUCKY ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

ERWIN L. LEWIS
President
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this 12th day of February, 2016, mailed to Dorislee Gilbert, Special Assistant Attorney General. 514 West Liberty Street, Louisville, KY 40202; Daniel Goyette, Cicely Jaracz Lambert, Sean Thomas Pharr, Counsel for Appellee, 719 West Jefferson Street, Louisville, KY 40202; Honorable Olu A. Stevens, Jefferson Circuit Judge, 700 West Jefferson Street, Louisville, KY 40202; Honorable Andy Beshear, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601; Henry G. Gyden, Co-Counsel for Amici Curiae NBA and NAACP, 1228 East 7th Avenue, Suite 200, Tampa, FL 33605; and Stanford Obi, Co-Counsel for Amici Curiae NBA and NAACP, Stanford Law Office PLLC, 1200 Envoy Circle, Suite 1203, Louisville, KY 40299.

LARRY D. SIMON

ARGUMENT

THIS COURT SHOULD AFFIRM THE RULING OF THE JEFFERSON CIRCUIT COURT.

Introduction

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991).

Despite its storied history, this is not a difficult case. The Jefferson Circuit Court, Division Six, called for 41 prospective jurors in a case involving Appellee James Doss, an African-American defendant. When the venirepersons arrived, all but one were white. The defense objected, and the court overruled the objection. The one African-American juror was stricken in the random drawing after jury selection. The thirteen jurors empaneled to hear the case were all white. On defense's renewed motion, the Court dismissed the jury, and called for another venire. A jury was again empaneled, and the parties tried the case. Mr. Doss was acquitted. The Commonwealth sought certifications of law, alleging that it was penalized by the Court's action.

The Constitutional Standard

The Sixth Amendment guarantees that an accused has the right to "a speedy and public trial, by an impartial jury of the State and district" where the crime was committed. U.S. Const., Amdt. VI. This guarantee applies to the several States through the Fourteeenth Amendment. U.S. Const., Amdt. XIV, § 1.

This principle was first applied to citizens of color in *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1879), *abrogated on other grounds by Taylor v. Louisiana,* 419 U.S. 522 (1975). In

Strauder, an African-American man was convicted of murder by an all-white jury, because African-Americans were not allowed to serve as jurors in West Virginia. The United States Supreme Court held that banning African Americans from serving as jurors was unconstitutional under the Equal Protection Clause.

Jurors must be selected from "a fair cross-section" of the community. *Holland v. Illinois,* 493 U.S. 474, 480 (1980), *quoting Taylor v. Louisiana,* 419 U.S. at 528.

> The cross-sectional requirement serves three important purposes: First, when the racial composition of the jury generally reflects that of the community, the jury's verdict is likely to be viewed as a legitimate expression of the community. Second, broad community participation on juries educates the public on the mechanisms of the criminal justice system, and allows them to exercise some control over the process, thereby increasing public confidence and respect for the government. Third, a jury that is drawn from a fair cross-section of the community protects defendants' rights because when jurors that span racial, gender, and class lines are brought together, the result is a "diffused impartiality." The emphasis on diffused impartiality is a recognition that "in a heterogeneous society, no person[] is truly impartial, unbiased, or unprejudiced." Therefore, the focus is shifted from the impartiality of any one juror to that of the jury as a whole. A diverse jury is more likely to be impartial because the biases of any one member are balanced against those of the rest of the group.

Hilary Weddell, "A Jury of Whose Peers?: Eliminating Racial Discrimination in Jury Selection Procedures," *Boston College Journal of Law & Social Justice*, 33:453, 468-469, http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1047&context=jlsj, *quoting* Hiroshi Fukurai & Richard Krooth, *Race in the Jury Box: Affirmative Action in Jury Selection* at 133 (Austin T. Turk ed., 2003).

One does not have the right, then, to a petit jury made up of one's own race, ethnicity, sex, economic status, or the like. Selecting a petit jury from a "fair cross-section of the

community" is the most practical solution in a heterogeneous world, as well as being the constitutional standard.

The main avenue of relief from potential prosecutorial misconduct currently available is a challenge to the prosecution's strikes of African American venirepersons under the standard outlined in *Batson v. Kentucky*, 476 U.S. 79 (1986).

However, this does not cover the situation at bar, wherein there were effectively no African-Americans to strike. As of 2014, the population of Jefferson County, Kentucky, was 21.5% African-American. http://quickfacts.census.gov/qfd/states/21/21111.html ; Brief of Amici Curiae NBA and NAACP at 13. Only one juror of the 41, or 2.4% of the panel, was African-American—and he was stricken in the random draw.

When the criminal defendant is faced with such a jury, as the Brief of *amici curiae* NBA and NAACP points out, it does not matter to him or her whether the failure of the court system to provide a fair cross-section of the community on the jury panel is due to discriminatory practices or due to some random procedure. The result is still the same. *See* Brief of *Amici Curiae* NBA and NAACP at 7.

The Reality of Discriminatory Jury Practices

In the 137 years since *Strauder v. West Virginia,* remarkably little progress has been made in assuring that Americans of color have the right to trial by a jury of even a fair cross-section of their communities. *See, e.g., Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring) (citing eight studies and anecdotal reports detailing widespread race discrimination in jury selection). The Alabama-based Equal Justice Initiative's seminal study *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Equal Justice Initiative, August 2010, http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf),

based on two years' research and hundreds of interviews in eight Southern states, found *inter alia* that

- racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases;

- hundreds of people of color called for jury service have been illegally excluded from juries after prosecutors asserted pretextual reasons to justify their removal.

- prosecutors have struck African Americans from jury service because they appeared to have "low intelligence," wore eyeglasses, walked in a certain way, dyed their hair, and countless other reasons that the courts have rubber-stamped as "race-neutral."

- some district attorney's offices explicitly train prosecutors to exclude racial minorities from jury service and teach them how to mask racial bias to avoid a finding that anti-discrimination laws have been violated…

- many defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias…

See summary, http://eji.org/raceandpoverty/juryselection.

Moreover, recent American history has illustrated "the cost of ignoring the apparent unfairness of court decisions made by all white juries," both in terms of overturned decisions and in terms of the eroding credibility of the jury system, racial backlash, and violence in the community. *See, e.g.,* Hiroshi Fukurai, "Social De-Construction of Race and Affirmative Action in Jury Selection," Berkeley J. African-American Law & Policy, 4:17 (January 2009), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1037&context=bjalp; *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* at 38-41.

Nor does this cry for fairness in jury selection come only from academe or the defense bar. On July 31, 2015, an all-star list of former state and federal prosecutors, including former United States Attorney Joseph diGenova of Washington, D.C., former Los Angeles County

(California) District Attorney Gil Garcetti, and the novelist Scott Turow, filed a brief *amici curiae* before the United States Supreme Court in the case of *Foster v. Chatman,* No. 14-8349.

Foster is distinguishable from this case because it involves especially blatant *Batson* violations in a capital case. It is significant to this Court nonetheless because the amici addressed jury selection in terms of prosecutorial standards:

> It should be self-evident that a prosecutor's fulfillment of his or her function depends not only on seeking a conviction but on upholding constitutional principles and maintaining the public's faith in the rule of law—a charge in which there is no place for race discrimination. *See Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). When prosecutors discriminate in the selection of jurors, they violate the Constitution and abdicate their responsibility to the public.

Foster v. Chatman, No. 14-8349, Brief for *Amici Curiae*, 07/31/2015, at 17-18.

The record here indicates that the Circuit Court initially was not interested in disrupting a venire in order to get more people of color on the jury. However, once the panel was set and all jurors were white, the Circuit Court used the only legal avenue open to it to attempt to get a jury closer to a "fair cross-section" under *Holland* to maintain the constitutional credibility of the trial. Your amicus submits that it was well within the discretion of the Circuit Court to dismiss the panel and call another group of jurors.

CONCLUSION

Your amicus, KACDL, respectfully requests that this Honorable Court answer the questions certified in accordance with the United States and Kentucky Constitutions and applicable case law, and above all that this Court find that it was within the Circuit Court's discretion to dismiss the jury panel and call a new one in order to meet the standard of *Holland v. Illinois,* 493 U.S. 474, 480 (1980), and *Taylor v. Louisiana,* 419 U.S. 522 (1975).

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